IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

HELEN LOPEZ, as Personal Representative
for the Wrongful Death Estate of JIM CLARK,
deceased,

Plaintiff,

vs. No. 2:11-CV-00227 JB-GBW

AMERICAN BALER COMPANY,
METSO CORPORATION, METSO
LINDEMANN, LINDEMANN RECYCLING
EQUIPMENT, INC., DON DICKASON AND
MARTHA DICKASON, Individually and
d/b/a dmDICKASON PERSONNEL SERVICES,

Defendants,

and

LINDEMANN RECYCLING EQUIPMENT, INC.,

Third-Party Plaintiff,

vs.

CITY OF LAS CRUCES,

Third-Party Defendant.

DEFENDANT AND THIRD-PARTY PLAINTIFF LINDEMANN RECYCLING EQUIPMENT, INC.'S OPPOSITION TO CITY OF LAS CRUCES' MOTION TO DISMISS

Third-Party Plaintiff, Lindemann Recycling Equipment, Inc. ("LREI"), by and through its undersigned attorneys, hereby submits the following opposition to Third-Party Defendant City of Las Cruces' (the "City") Motion to Dismiss and Memorandum in Support [Docs. 35 and 36]:

INTRODUCTION

The City's Motion asks this Court to put the cart before the horse by assuming facts outside of LREI's Third-Party Complaint (the "Complaint") and drawing inferences in favor of the City. Simply put, the City wholly mischaracterizes and misapplies the applicable standard on a motion to dismiss.

LREI's Complaint pleads facts sufficient to establish a plausible contribution and indemnity claim against the City. The City's suggestion that such claim is barred by the Worker's Compensation Act (the "Act") is both unsupported and premature because it presumes facts not alleged by LREI and requires inferences to be drawn in the City's favor. In particular,

- there is no allegation that the City was Mr. Clark's direct employer;
- there is an insufficient factual basis to conclude the City otherwise qualifies as an "employer" under the Act; and
- there are no facts to support the City's assumption that it took the requisite steps to comply with the Act and avail itself of the Act's exclusivity provision.

Finally, even if there were sufficient facts before this Court to conclude that the Act could apply (and there are not), LREI has pled facts sufficient to establish a plausible exception to the Act's exclusivity provision.

Because the City cannot establish that the Act bars LREI's claim, resolution of the City's argument pertaining to LREI's right of contribution or indemnity is premature. Moreover, the City's Motion admits that LREI may be subject to joint and several liability for the negligence or conduct of the City, and this admission illustrates that LREI has a plausible claim and that the City's Motion must be denied. If LREI is held jointly and severally liable for the City's allocated portion of plaintiff's damages, LREI would have an indemnity or contribution claim. Whether LREI would be subject to joint and several liability and the effect of the Act on such a claim are unsettled and premature inquiries that require a developed factual record, and are not fit for determination at the motion to dismiss stage. As a result, the City's Motion must be denied.

ARGUMENT

I. LEGAL STANDARD FOR MOTION TO DISMISS

When evaluating a defendant's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), courts accept a plaintiff's factual allegations as true. *Erickson v. Pardus*, 551 U.S. 89, 94, 127 S. Ct. 2197 (2007); *Kerber v. Qwest Group Life Ins.*, 647 F.3d 950, 959 (10th Cir. 2011). In addition, courts draw all reasonable inferences in plaintiff's favor. *Leverington v. City of Colorado Springs*, 643 F.3d 719, 722-23 (10th Cir. 2011). "To survive a motion to dismiss, a plaintiff must 'nudge his claims across the line from conceivable to plausible.'" *Cory v. Allstate Ins.*, 583 F.3d 1240, 1244-45 (10th Cir. 2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955 (2007)). A plaintiff need only allege sufficient facts to "make the claim plausible on its face." *Kerber*, 647 F.3d at 959; *see In Re Grandote Country Club Company, Ltd.*, 252 F.3d 1146, 1149-50 (10th Cir. 2001) (discussing the different standards on summary judgment and a motion to dismiss).

Significantly, a plaintiff need not demonstrate that its claim is likely to succeed on the merits for a complaint to survive a motion to dismiss. *See, e.g.*, *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515, 122 S. Ct. 992 (2002) ("Rule 8(a) establishes a pleading standard without regard to whether a claim will succeed on the merits").

II. LREI'S COMPLAINT ALLEGES SUFFICIENT FACTS TO ESTABLISH A PLAUSIBLE CONTRIBUTION AND INDEMNITY CLAIM AGAINST THE CITY THAT IS NOT PROHIBITED BY THE WORKERS COMPENSATION ACT

A. The City Cannot Show It Was An Employer and Subject to the Workers' Compensation Act Based on the Facts Pled by LREI

The City's Motion baldly asserts that LREI cannot establish a contribution or indemnity claim against the City because the Act's exclusive remedy provision prohibits such a claim. The City's argument fails for two reasons. First, the City's argument presumes that all facts set forth by LREI and inferences to be drawn from these facts should be viewed in a light most favorable ***to the City***: this is not the proper standard on a motion to dismiss. Second, the City's reliance on the *Beal* case is misplaced because the City cannot establish at this stage that the Act applies. As a result, the City's Motion must fail.

1. The City assumes the Act's exclusivity provision applies

The Act's exclusivity provision applies only to an "employer who has complied with the provisions of the Worker's Compensation Act relating to insurance . . . ." NMSA 1978, § 52-1-8 (1989). The Act specifically defines the entities that qualify as an "employer" for the purposes of the Act. *See id.* at § 52-1-15. In addition to direct employers, New Mexico courts have held that entities may qualify as "special employers" or "statutory employers," and that such entities are also subject to the exclusivity provision of the Act. *See, e.g., Rivera v. Sagebrush Sales*, 118 N.M. 676, 678-679, 884 P.2d 832, 834-35 (Ct. App. 1994); *Hamberg v. Sandia Corp.*, 2008-NMSC-015, ¶ 8, 143 N.M. 601, 179 P.3d 1209.

When an entity is not a direct employer, courts apply either the special employer doctrine or the statutory employer doctrine to determine whether an entity is an "employer" under the

Act. *Hamberg*, 2008-NMSC-015, at ¶ 9. The difference between a special or statutory employer depends on whether the entity procured work or labor. *Id.*. A statutory employment relationship exists when an entity procures work to be completed. *Id.* In contrast, when a direct employer arranges to provide labor for a third party, courts apply the special employer test. *Id.* at ¶ 10. The special employer test focuses on whether (1) a contract for hire has been made between the employee and entity, (2) whether the work being performed is essentially the work of the special employer, and (3) whether the alleged special employer has the right to control the details of the work being performed. *See Rivera*, 118 N.M. at 678-79, 884 P.2d at 834-35.

For instance, in *Hamberg v. Sandia Corporation*, the New Mexico Supreme Court applied the three-part special employment test while noting that "modern labor contracts can be complex." 2008-NMSC-015, at ¶ 13. In *Hamburg*, the plaintiff was a graphic artist directly employed by a company that was under contract to provide professional services to defendant Sandia. Under the express contract between the direct employer and Sandia, the direct employer was responsible for payment of workers compensation premiums, and this contract explicitly set out the type of control Sandia would have over the workers provided. *Id.* at ¶¶ 2-4. The contract stated that Sandia was entitled to have a "delegated representative who could assign work, monitor technical performance, and inspect and accept the work of [the direct employer's] employees." *Id.* at ¶ 4. Plaintiff was injured during the course of this work and sued Sandia for negligence. The lower court granted summary judgment for Sandia, holding that Sandia was plaintiff's special employer and was protected by the Act's exclusivity provision. *Id.* at ¶ 6.

On appeal, the New Mexico Supreme Court declined to apply the statutory employment test because Sandia contracted with plaintiff's direct employer for labor, not work. *Id.* at ¶10.

Turning to the special employment test, the Court held the first two elements were undisputed by plaintiff. With respect to the third element, the Court concluded that Sandia shared the "right to control" the details of plaintiff's work pursuant to the services contract and was, therefore, a special employer. *See id.* at ¶¶ 9-17. Sandia assigned projects, monitored plaintiff's technical performance, and inspected plaintiff's work to approve it; this was enough to satisfy the right to control element. *See id.*; *see also Vigil v. Digital Equipment Corp.*, 1996-NMCA-100, ¶ 21, 122 N.M. 417, 925 P.2d 883 (holding that special employer had right to control details of plaintiff's work because plaintiff was instructed by special employer and special employer maintained final authority regarding quality and acceptability of work performed by plaintiff).

Significant to the Court's analysis here, after holding that Sandia met the requirements of a special employer, the Court did not end its inquiry. Instead, the Court evaluated whether Sandia complied with the insurance requirements of the Act and held that the services contract between plaintiff's direct employer and Sandia, which explicitly required the direct employer to carry workers' compensation insurance and pay premiums, was sufficient to meet the Act's standard. *Hamberg*, 2008-NMSC-015, at ¶¶ 18-19. In other words, the Court required Sandia to provide affirmative evidence of its compliance with the Act's insurance requirements before extending the Act's umbrella of exclusivity to the special employer, Sandia.

Applying this analysis to LREI's Complaint, it is clear that LREI's Complaint sets forth a plausible claim against the City that is ***not*** barred by the Act. As a threshold issue, the City's argument that Mr. Clark was a "statutory employee" of the City is not supported by any conceivable reading of LREI's Complaint. The Complaint alleges Mr. Clark was placed at a recycling facility under the supervision of the City, but nowhere in the Complaint does LREI allege that the City contracted with plaintiff for specific ***work*** to be performed. *See* LREI's Third-Party Complaint at ¶¶ 12-32. The City's Motion derives this assumption out of thin air. The statutory employment test is not applicable to the relationship between the City and Mr. Clark, and fails to support the City's Motion. *See Hamberg*, 2008-NMSC-015, at ¶ 10.

Turning to the "special employment doctrine," the City's attempt to cast itself as a special employer at the motion to dismiss stage requires inference upon inference to be drawn in favor of the City, and not LREI. The City's attempts should be rejected. LREI's Complaint alleges that Mr. Clark was placed as a temporary employee at the recycling facility under the supervision of the City, and that the City employed both permanent and temporary employees at this facility. *See* Third-Party Complaint at ¶¶ 16-18. Nowhere does LREI specifically allege the details of any contract, implied or express, between the City and Mr. Clark dictating the type of work or labor that Mr. Clark was placed to perform. And nowhere does LREI specifically allege the details of any agreement between Mr. Clark's direct employer and the City regarding the City's ability to control the work Mr. Clark was performing. Nor is LREI required to provide this level of evidentiary detail at the pleading stage. *See Cory*, 583 F.3d at 1244-45.

The City's Motion asks this Court to infer that because LREI alleges Mr. Clark was supervised by the City, the details of Mr. Clark's work must have been controlled by the City. This argument requires a leap of logic that is wholly unsupported and inappropriate at the motion to dismiss stage, and requires the Court to improperly draw an inference in favor of the City. In contrast, a reasonable inference can be drawn from these facts that Mr. Clark was supervised at a macro level by the City while the details of the work he performed were controlled exclusively by Clark's direct employer. As the Court noted in *Hamburg*, modern labor arrangements are complex.

An assumption that the details of Mr. Clark’s employment arrangement with the City satisfy the three distinct prongs of the special employment test is unwarranted. It is clear that making such an assumption at the motion to dismiss stage is premature. For instance, the courts in *Hamberg*, *Vigil*, and *Rivera* all evaluated the facts and details surrounding the employment relationships at issue at the summary judgment stage after the factual records surrounding these employment relationships were fully developed.

Moreover, even if the City could demonstrate that the City was Mr. Clark’s special employer based solely on the factual allegations of LREI’s complaint, which it cannot, there is no factual allegation contained in LREI’s complaint that the City fulfilled its insurance obligations as an employer under the Act. The first condition of the Act’s exclusivity provision requires a party to show that “the employer has complied with the provisions thereof regarding insurance.” NMSA 1978 §§ 52-1-6, -8. Thus, even after a court finds that a special employment relationship exists, it must still evaluate whether there is sufficient evidence to conclude the Act’s insurance requirements were satisfied. *See, e.g.*, *Hamberg*, 2008-NMSC-015, at ¶ 18. As LREI’s complaint contains no facts to determine that the City has affirmatively complied with this obligation, the City’s motion must be denied.

2. The City’s reliance on *Beal* to dismiss LREI’s claims is misplaced

Because the City cannot establish that the Act applies, the City’s reliance on *Beal* is premature, if not entirely misplaced. As shown above, the City cannot make the requisite showing at this early stage in the litigation to establish that the City qualifies as an “employer”;

thus, the Act's exclusive remedy provision does not apply. Likewise, a determination that the Act bars LREI's contribution or indemnity claim is equally premature.

In the 1956 *Beal* case, a defendant to a negligence case attempted to join the direct employer of the injured plaintiffs to seek contribution from this employer in the civil suit advanced by the plaintiffs. *Beal v. Southern Union Gas Co.*, 62 N.M. 38, 40, 304 P.2d 566 (1956). The court held the claim for contribution was not allowed. *Id.* at 41, 304 P.2d at 568. However, unlike the facts before the Court here, the *Beal* decision involved plaintiffs' direct employer and thus did not require a threshold determination of whether the Act applied. Furthermore, unlike the City in the instant case, there was no question in *Beal* as to whether the direct employer had complied with the requisite provisions of the Act to avail itself of the Act's exclusivity provision. Because these threshold showings cannot be made by the City at this early stage, the City's reliance on *Beal* fails to carry the City's motion.

B. Even if the Worker's Compensation Act Applied, LREI's Complaint Alleges Sufficient Facts to Establish an Exception to the Act's Exclusivity Provision

Even if the City could demonstrate at this stage that the City (1) was a special employer that had (2) complied with the Act's provisions, which it cannot, LREI's complaint alleges sufficient facts to establish an exception to the Act's exclusivity provision under *Delgado v. Phelps Dodge Chino, Inc.* In *Delgado*, the New Mexico Supreme Court held that "[u]nder Section 52-5-1, employers seeking exclusivity must be held to the same standard of conduct, and suffer equivalent consequences for a violation of that standard, as workers seeking compensation." 2001-NMSC-034, ¶ 24, 131 N.M. 272, 34 P.3d 1148. In particular, "when an employer intentionally inflicts or willfully causes a worker to suffer an injury that would otherwise be exclusively compensable under the Act, that employer may not enjoy the benefits of exclusivity and the injured worker may sue in tort." *Id.* at ¶ 24. Under this standard, an employer acts "willfully" when:

> "(1) the worker or employer engages in an intentional act or omission, without just cause or excuses, that is *reasonably expected to result in* the injury suffered by the worker; (2) the worker or employer expects the intentional act or omission to result in the injury or has utterly disregarded the consequences; and (3) the intentional act or omission proximately causes the injury."

Id. at ¶ 26 (emphasis added).

The facts pled by LREI allege an exception to the Act's exclusivity provision. LREI's Complaint states that Mr. Clark climbed inside the subject baler without ***any*** safety measures taken to lockout or otherwise de-energize the baler's power sources. (LREI's Complaint at ¶¶ 18-20). Furthermore, the Complaint alleges this action was taken in direct contrast to written safety policies that were in place. (*See id.* at ¶ 21). After Mr. Clark was illogically ordered to climb inside a confined space and into the path of a steel hydraulic ram, another employee of the City manually engaged the ram and Mr. Clark was crushed. (*See id.* at ¶ 22). The practice of allowing or instructing workers to climb inside a fully-confined space with no safety measures in place into the direct path of a steel ram was a reckless and inexcusable practice by the City. Furthermore, the City's practice of permitting employees to engage the ram while other employees were inside the baler shows an egregious disregard for basic safety practices and common sense.

These facts sufficiently plead a *Delgado* claim when such facts are accepted as true and all reasonable inferences are drawn in favor of LREI. *See Leverington*, 643 F.3d at 722-23. In particular, the City's practice of instructing or permitting employees to climb inside the baler while the ram is engaged is reasonably expected to result in an employee being crushed by the ram: the precise event that led to Mr. Clark's death. Second, the City utterly disregarded the dangerous consequences and inevitable harm that was bound to result from this practice. Third, this practice was clearly the proximate cause of Mr. Clark's death. *See Dominguez v. Perovich Properties, Inc.*, 2005-NMCA-050, ¶ 16, 137 N.M. 401, 111 P.3d 721. The only reasonable inference that need be drawn from the facts alleged is that the operator engaged the ram with the knowledge that Mr. Clark had climbed inside the baler. Because all reasonable inferences are drawn in favor of LREI, the City's Motion must fail. Should this Court find the allegations contained in LREI's Complaint do not specifically set out the elements of a *Delgado* claim, at a minimum, LREI should be permitted to amend its Complaint to further define the egregiousness of the City's conduct in allowing or directing this practice to take place.

In sum, the City's attempt to shield itself under the Act presumes facts that are not set forth in LREI's complaint, and requires this Court to improperly draw inferences in the City's favor. This is not the standard on a motion to dismiss, and the City's Motion must fail.

III. THE CITY'S MOTION *ADMITS* THAT LREI HAS ADVANCED A PLAUSIBLE CLAIM; THUS, DISMISSAL OF THE CITY AT THIS STAGE IS UNWARRANTED.

The City's Motion admits that LREI may be held jointly and severally liable for the negligence or conduct of the City, which would give rise to an indemnity claim, yet baldly asserts that the Complaint against the City should be dismissed anyway. To be sure, LREI should ***not*** be subject to joint and several liability in the underlying case. However, because no authority in New Mexico conclusively extinguishes this possibility, LREI's Complaint sets forth a plausible claim for indemnity or contribution. Furthermore, as evidenced above, there are substantial facts that must be developed through discovery in this case to determine the employment details between the City and Mr. Clark and whether the City may qualify as an employer under the Act. These facts are necessary to evaluate the nature and viability of LREI's claim against the City. Accordingly, the motion to dismiss stage is not the proper juncture to impart finality on this issue.

Comparative fault applies in New Mexico tort cases. *See, e.g.*, *Marchese v. Warner Communications*, 100 N.M. 313, 670 P.2d 113 (Ct. App. 1983). In cases involving comparative fault, when a jury finds "that a plaintiff's injury was caused by a combination of negligence of more than one person," the jury will apportion fault among the plaintiff, defendants, and non-parties. UJI 13-2219 NMRA; *see Sena v. N.M. State Police*, 119 N.M. 471, 474, 892 P.2d 604, 607 (Ct. App. 1995); *Taylor v. Delgarno Transp., Inc.*, 100 N.M. 138, 667 P.2d 445 (1983). When such an apportionment is made, absent an exception, each party at fault is severally liable for the proportion of damages allocated to it by the jury. NMSA 1978, § 41-3A-1 (1987).

However, one exception contained in the several liability statute provides that joint and several liability applies to "any persons strictly liable for the manufacture and sale of a defective product, but only to that portion of total liability attributed to those persons." *See id.* at § 41-3A-1(C). Thus, defendants in a product liability case in the chain of distribution are subject to joint and several liability for the proportion of damages allocated to all of the "product defendants," and a right of indemnity arises for members in the chain of distribution. *Id.* at § 41-3A-1(C); *Trujillo v. Berry*, 106 N.M. 86, 89, 738 P.2d 1331 (Ct. App. 1987). In addition, the statute reserves the right to apply joint and several liability "to situations not covered by any of the foregoing and having a sound basis in public policy," suggesting New Mexico courts may have discretion to extend joint and several liability in other cases as well. NMSA 1978 § 41-3A-1(C).

It is unclear whether the joint and several liability of a product liability defendant would encompass fault allocated to other parties, such as the City. The City's Motion recognizes this uncertainty. (City's Motion at 4). In addition, the City cites the *Marchese* and *Jaramillo* cases where non-product defendants were included in the same apportionment of fault as the product defendants, but these cases do not explicitly address the extent to which a product defendant can be held jointly and severally liable. Thus, these cases do not speak to the validity of LREI's Complaint for contribution or indemnity. *See Sangre de Cristo Development Corp. v. City of Santa Fe*, 84 N.M. 343, 348, 503 P.2d 323, 328 (1972) ("The general rule is that cases are not authority for propositions not considered"). As the City notes, the New Mexico uniform jury instructions for comparative fault in a product liability case state that the fault of plaintiff should be compared to the fault of a product liability defendant, but these instructions are silent regarding how the fault of a third-party should be allocated and whether joint and several liability would apply. *See* UJI 13-1427 NMRA.

Because this issue is unsettled and requires a full development of the facts in this case through discovery, resolution of this issue is premature. *See, e.g., Wong v. Precision Airmotive LLC*, No. 05CV1604 (WWE), 2007 WL 1576155, at *3 (D. Conn. 2007) ("On this motion to dismiss, the Court can only rule within the confines of the facts alleged. The Court will not rule on these two new legal theories without full legal briefing of the relevant facts and issues. It will determine whether the third-party defendants may be liable for contribution on a ***motion for summary judgment***.") (emphasis added). Because all reasonable inferences must be drawn in favor of LREI and the City admits that an indemnity claim may arise, the City's Motion must be denied.

CONCLUSION

For the reasons set forth above, LREI respectfully requests this court deny the City's Motion to Dismiss LREI's Third-Party Complaint.

Dated this 25th day of June, 2012.

/s/ Joshua A. Allison

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of June, 2012, I filed the foregoing Defendant and Third-Party Plaintiff Lindemann Recycling Equipment, Inc.'s Opposition to City of Las Cruces' Motion to Dismiss electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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